MELIPOLY ENTERPRISE SDN BHD
v. ONG HONG YEOK & ANOR

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-01(A)-736-12-2021]
18 MARCH 2024

Abstract – *(i) An employee cannot rely on other reasons in court, in justifying the termination of an employee, when such reasons are not provided in the letter of termination; (ii) The Industrial Court is seized with the jurisdiction to inquire into a representation referred to it, once the Minister of Human Resources had made a reference pursuant to s. 20(3) of the Industrial Relations Act 1967, even if an employee subsequently refuses the prospect of reinstatement to employment.*

LABOUR LAW: *Employment – Termination – Retrenchment – Employee retrenched from employment – Letter of termination stated that employee retrenched due to prevailing economic recession and prolonged period of poor sales revenue – Employer cited unsatisfactory performance, conflict of interest and sexual harassment as reasons for termination in court – Whether employer could rely on reasons not stated in letter of termination – Whether retrenchment bona fide – Whether termination with just cause or excuse*

INDUSTRIAL COURT: *Jurisdiction – Termination from employment – Representation referred to Industrial Court – Employee no longer wanted reinstatement by time of hearing as he was gainfully employed in another company – Industrial Court proceeded to inquire into reference and award damages or relief – Whether Industrial Court seized with jurisdiction – Ministerial reference – Industrial Relations Act 1967, s. 20(3)*

The first respondent served with the appellant as its Marketing Manager before his employment was terminated. The termination, as stated in the letter of termination, was due to the prevailing economic recession and prolonged period of poor sales revenue. Dissatisfied, the first respondent sought advice from the Department of Industrial Relations but the reconciliation sessions did not materialise. The first respondent's representation was then referred to the second respondent ('Industrial Court') and the latter found that the former was dismissed without just cause and excuse. The appellant applied for a judicial review at the High Court and the said application was dismissed. The High Court found that, *inter alia*, (i) the appellant relied on other grounds of termination not stated in the letter of

termination, namely, unsatisfactory performance, conflict of interest and sexual harassment; and (ii) the Industrial Court was right in ruling that it had jurisdiction to hear the first respondent's case notwithstanding that he no longer wanted reinstatement by the time of the hearing as he was gainfully employed in another company. Hence, the present appeal. The issues that arose for adjudication were: (i) whether the termination was with just cause or excuse; and (ii) the jurisdiction of the Industrial Court to inquire into the reference and award damages or relief when the first respondent had testified that he did not wish to be reinstated.

Held (dismissing appeal with costs)

See Mee Chun JCA delivering the judgment of the court:

(1) The reasons given in the letter of termination were 'current economic recession' and 'prolonged period of poor sales revenue'. The appellant could only rely on the reasons stated in the letter of termination and no other reasons; the appellant could not rely on other grounds such as unsatisfactory performance, conflict of interest and sexual harassment. The statement of comprehensive income was evidence that the appellant was suffering financial losses occasioned by the current economic recession and prolonged period of poor sales revenue. However, the appellant failed to prove redundancy. While the management had the prerogative of re-organisation, it was subject always to it being exercised *bona fide*. The first respondent's function and work as a Marketing Manager was reduced but never eliminated. Therefore, the termination was without just cause and excuse and the retrenchment was not *bona fide*. (paras 30, 31, 35, 36, 39, 41 & 42)

(2) The Industrial Court was seized with jurisdiction once the Minister of Human Resources had made a reference, pursuant to s. 20(3) of the Industrial Relations Act 1967. Even if the first respondent stated that he did not wish to be 'put back into employment', the Industrial Court nevertheless continued to have jurisdiction as it was seized with jurisdiction pursuant to the Ministerial reference. (paras 52 & 54)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] CLJU 30; [1981] 1 LNS 30 FC ***(refd)***

Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 10 CLJ 663 FC ***(refd)***

Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor [2021] 1 CLJ 365 CA ***(refd)***

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 6 CLJ 700 CA ***(refd)***

Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] CLJU 131; [1999] 1 LNS 131 HC ***(refd)***

The Borneo Post Sdn Bhd v. Margaret Wong [2001] 8 CLJ 758 HC ***(refd)***

William Jack & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Woo Vain Chan v. Malayawata Steel Bhd [2016] 10 CLJ 176 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

For the appellant - Tay Shieh Chin & Eugene Khoo Yean Shern; M/s Yeoh Shim Siow & Lay Kuan
For the respondent - Koong Yu Qian & Jess; M/s Aziz & Co

[Editor's note: For the High Court judgment, please see Melipoly Enterprise Sdn Bhd v. Ong Hong Yeok & Anor [2022] CLJU 2234; [2022] 1 LNS 2234 (affirmed).]

Reported by Najib Tamby

JUDGMENT

See Mee Chun JCA:

Introduction

[1] On 1 June 2020, the Industrial Court (IC) found the first respondent's dismissal to be without just cause and excuse and awarded a sum of RM47,000 which was derived from compensation *in lieu* of reinstatement, backwages and less a deduction of 20%.

[2] The appellant then sought to challenge the award of the IC by way of judicial review. This was dismissed by the High Court (HC) on 17 November 2021.

[3] The appeal to this court was also dismissed for which we now give our reasons.

Parties And Background Facts

[4] The appellant is a company with the business activity of selling and distributing honey products. The first respondent commenced employment on 26 February 2016 with the appellant as marketing manager with a probationary period of three months. By letter of appointment dated 1 April 2016, he was appointed marketing manager from that date.

[5] The monthly salary of the first respondent then was RM5,000 and increased to RM6,000 from March 2018. Due to the appellant's financial situation, it was subsequently agreed that the first respondent's salary would be reduced by RM1,000 per month until the situation improved.

[6] The appellant's financial position did not improve. The first respondent was then issued a letter of termination dated 6 May 2019, "that we have no choice but to terminate your employment as per terms in your contract. This letter shall serve as a formal notice of termination pursuant to clause 4 of your employment contract".

[7] The first respondent was dissatisfied with the termination and sought advice from the Department of Industrial Relations, Bentong Branch. The reconciliation sessions did not materialise. The first respondent's representation was then referred to the IC.

At The HC

[8] As alluded to earlier, the IC found the first respondent to have been dismissed without just cause and excuse.

[9] The HC judge (HCJ) dismissed the judicial review application of the appellant. The grounds of judgment (GOJ) can be found in encl. 10/4-22.

[10] In para. 22, the HCJ found there were only two issues to be decided:

> (i) what was the actual reason for the termination of the first respondent's employment and has it been made out by the applicant; and
>
> (ii) whether the first respondent's termination from his employment was done with or without just cause or excuse.

[11] The HCJ noted that the letter of termination stated that the reason for termination was due to the prevailing economic recession and prolonged period of poor sales revenue (para. 23).

[12] The HCJ found that the appellant had relied on other grounds of termination not stated in the letter of termination. These other grounds were unsatisfactory performance, conflict of interest where there was a failure to disclose a personal interest in a company known as Bee & Joy Enterprise and sexual harassment. The HCJ agreed with the IC that the court is only to inquire on the reasons advanced by the appellant for the dismissal and not go into another reason not relied upon or to find one for it. The cases of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] CLJU 30; [1981] 1 LNS 30; [1981] 2 MLJ 129; *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 and *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2021] 10 CLJ 663, were cited to support this proposition. Refer to paras. 24 to 27 of the GOJ. The HC concluded in paras. 28 and 29 that the IC was right in not inquiring into reasons subsequently put up to justify the dismissal.

[13] On the issue of without just cause and excuse, the HCJ dealt firstly with whether the IC had jurisdiction to hear the first respondent's claim considering the allegation that the first respondent was not claiming for reinstatement. Relying on *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 6 CLJ 700; [2021] 4 MLJ 924, the HCJ stated the following in paras. 34 and 35:

> 34. Based on the above, it is clear that the Industrial Court was right in ruling that it has jurisdiction to hear the first respondent's case notwithstanding that the first respondent no longer wanted reinstatement by the time of the hearing as he was gainfully employed in another company.

35. It is my view that the Industrial Court was seized with jurisdiction to hear the dispute between the Applicant and the first respondent once the Minister had duly made a reference under section 20(3) of the IRA.

[14] On redundancy, it was said in para. 42 of the GOJ that even if financial losses had been proved, the appellant had failed to prove there was redundancy in the company. It was further stated in para. 43 of the GOJ that the appellant's reorganising exercise was not *bona fide* as the appellant had on numerous occasions stated the decision to terminate was due to unsatisfactory and/or poor performance based on the company's sales reports. There was no evidence that the first respondent had been informed there was to be a retrenchment exercise and the HCJ found the first respondent was the only employee who was dismissed under the retrenchment (para. 44 of the GOJ).

Submissions Of The Appellant

[15] It was submitted by the appellant that the HCJ decision was founded on two main issues namely:

17. The appellant's present appeal against the Learned High Court Judge's decision which affirmed the Industrial Court award is founded on two main issues:

(a) Whether there was a genuine redundancy leading to the retrenchment of the respondent?

(b) Whether the Industrial Court has the jurisdiction to inquire into the reference or make any award of damages or other form of relief when the respondent had testified that he did not wish to be reinstated to his former job/claim for unlawful dismissal?

[16] The appellant submitted that the HCJ had failed to appreciate that sufficient evidence had been adduced that it faced financial hardship, which the first respondent was aware of. There was also no appreciation that under the restructuring exercise the appellant had consolidated the first respondent's job functions to be taken over by the appellant's CEO.

[17] It was further submitted that "redundancy situation may arise where the business requires fewer employees of whatever kind", *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] CLJU 131; [1999] 1 LNS 131.

[18] Even though the misconduct committed by the first respondent was not mentioned in the letter of termination, the selection of employees for retrenchment were done based on selected criteria, namely misconduct, poor performance and salary consideration due to poor financial position.

[19] As recognised in *William Jack & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, it is the right and management prerogative of the company to reorganise the business as long as the decision is exercised *bona fide*.

[20] The other main point of contention was the jurisdiction of the IC to inquire into the reference or award any damages when the first respondent had testified he did not wish to be reinstated. Reference was made to *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 and *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900; [2015] MLJU 234.

Submissions Of The First Respondent

[21] The first respondent took the position that the appellant could not submit on grounds of dismissal not stated in the letter of termination. It would also not be submitting on those grounds.

[22] It was contended there had been no actual redundancy and no proof of financial losses. Even if the appellant had suffered losses during the relevant period, there was no actual and genuine redundancy. Reference was made to *William Jacks, Woo Vain Chan v. Malayawata Steel Bhd* [2016] 10 CLJ 176; [2016] 2 MLJ 848 and *Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor* [2021] 1 CLJ 365; [2021] 1 MLJ 447.

[23] On reinstatement and jurisdiction, the first respondent submitted that *Sanbos* applied and that *Holiday Inn* is no longer good law. *Unilever* was wrongly relied on in the facts of the instant appeal, as the employee there had exceeded the retirement age at the time the award was handed down.

Our Decision

[24] The issues raised in this appeal relate to whether the termination was without just cause and excuse; and the jurisdiction of the IC to inquire into the reference and award any damages or relief when the first respondent had testified he did not wish to be reinstated.

Termination

[25] By letter of appointment dated 1 April 2016 (encl. 5/138-141), the first respondent was appointed marketing manager as from that date. By then, he had served his probation period of three months.

[26] The first respondent was terminated by the letter of termination dated 6 May 2019 (encl. 6/132-133) as below:

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MELIPOLY

PRIVATE AND CONFIDENTIAL

6th May 2019

Mr. ONG Hong Yeoh, James

Dear Mr. Ong,

Notice of Termination

We regret to inform you that due to the current economic recession and a prolonged period of poor sales revenue, the company has been sustaining serious operational losses for the past six months. Despite our continuing efforts at increasing sales revenue and reducing other expenses over the past six months, the company's cash reserves are now at a critically low level.

As such, we must regretfully inform you that we can no longer sustain your employment and that we have no choice but to terminate your employment as per the terms in your contract. This letter shall serve as a formal notice of termination pursuant to Clause 4 of your employment contract.

The final payment will be made on 6th June 2019, less any remaining petty cash issued to you and personal invoices (if any) owed to the company.

Please perform a proper handover of the following at company HQ on or before 6th June 2019:

1. Your responsibilities;
2. Any company documents including remaining official name cards;
3. Any customer contracts/contacts;
4. Return any remaining petty cash issued to you;
5. Return of company vehicle Mitsubishi Pajero license plate no. BRT6026;
6. Return of company mobile phone SIM card no. 019-880 0018;
7. Return of company uniform (T-shirts, sweaters, caps etc), materials, computers/mobile devices and any other company property entrusted to your possession;
8. Any other relevant items not listed above.

This termination should not be taken as a reflection on your performance. It is very unfortunate that the prolonged economic recession has made it impossible for the company to sustain your employment and it is with deep regret that we are forced to take this course of action.

MELIPOLY ENTERPRISE SDN BHD (1176262-D) 03-77333921 www.melipoly.com
D/O, Block C, Dataran Prima, No. 1, Jalan 0329/17, 03-77311923 mp@melipoly.com
47400, Petaling Jaya, Selangor, Malaysia.

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MELIPOLY

You are free to seek other employment opportunities with immediate effect. We will be happy to provide a letter of reference for you if you should require it.

We thank you for your service and contributions to the company and wish you all the best in your future endeavours.

Sincerely,

NGEOW CHONG WEI, Mr.
Director
Melipoly Enterprise Sdn Bhd (1178262-D)

MELIPOLY ENTERPRISE SDN BHD (1178262-D)

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[27] Although the letter was dated 6 May 2019, it was the first respondent's evidence he received it by courier on 24 May 2019. He was informed verbally on 6 May 2019 and he had no objection. His evidence in re-examination at encl. 8/24 was as follows:

> WSM Mr Ong, my question is did you have any objection to the notice of termination when notice was given to you verbally on 6th of May and then on 24th of May only you received it by courier. Did you have any objection?

ONG I didn't have any (04:03:43PM) objection because I already go to the IR department.

The acknowledgment of receipt can be seen in encl. 6/135.

[28] Thus, for all intent and purpose, there is a letter of termination dated 6 May 2019 of which the first respondent had notice.

[29] Paragraph 1 of the letter of termination spelt out the reasons for termination followed by para. 2 that "we have no choice but to terminate your employment". The aforesaid paragraphs are reproduced below:

> We regret to inform you that due to the current economic recession and a prolonged period of poor sales revenue, the company has been sustaining serious operational losses for the past six months. Despite our continuing efforts at increasing sales revenue and reducing other expenses over the past six months, the company's cash reserves are now at a critically low level.
>
> As such, we must regretfully inform you that we can no longer sustain your employment and that we have no choice but to terminate your employment as per the terms in your contract. This letter shall serve as a formal notice of termination pursuant to Clause 4 of your employment contract.

[30] A perusal of the letter of termination shows that the reasons given were "current economic recession" and "prolonged period of poor sales revenue".

[31] It is trite that the appellant can only rely on the reasons as stated in the letter of termination and no only reason. We therefore agree with the HCJ that the appellant could not rely on other grounds such as unsatisfactory performance, conflict of interest and sexual harassment.

[32] To drive home this point, we refer to *Goon Kwee Phoy* where the Federal Court stated at p. 136:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out*. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. *The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it*. (emphasis added)

[33] In *Maritime Intelligence*, the same too was said by the Federal Court at p. 687:

> [51] In summary, on this point, it is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s. 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. *There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman.* (emphasis added)

[34] The Federal Court dwelt at length with *Goon Kwee Phoy* and cited the same passage as we did earlier and went on as follows at p. 690:

> [69] This portion of the passage restricts the enquiry of the Industrial Court to the reasons given for the action taken by the employer. *That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal*. This court in *Goon Kwee Phoy* (above) arrived at the same point as we did, in the earlier paragraphs of this judgment, far more pithily, but utilising the same rationale.
>
> (emphasis added)

[35] With regard to the stated grounds as given in the letter of termination, we are of the considered opinion that the statement of comprehensive income was evidence that the appellant was suffering financial losses occasioned by the current economic recession and prolonged period of poor sales revenue. We refer to encl. 6/123-124 which is the appellant's statement of comprehensive income for the period 1 October 2018 to 31 March 2019, which shows a net loss of RM582,546.72. The first respondent was aware of the financial situation as per his witness statement Q&A 3 (encl. 5/66) where he agreed to waive RM1,000 per month for three months believing that the company will repay the sum when the company's financials are stabilised.

[36] However, we found that the appellant had failed to prove redundancy. We say so for the following reasons.

[37] In *William Jacks*, it has been said at p. 241:

> .... The issue before that Court was whether there was a genuine retrenchment exercise *vis-a-vis* the respondent. *Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action* (per S.K. Das J in *Hariprasad v. Divelkar AIR* [1957] SC 121 at p. 132).
>
> *Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to*

organise his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide.

(emphasis added)

[38] Reference is further made to *Ng Chang Seng* at pp. 381 to 382 (CLJ); p. 468 (MLJ):

> [63] As stated the burden of proof is always on the company to show before the Industrial Court that the termination on ground of retrenchment arising out of redundancy is for a just cause or excuse and that it is lawful and not actuated by irrelevant considerations like poor performance or perceived insubordination or that it was not done mala fide and did not reek of unfair labour practice. The Industrial Court found as a matter of fact that the company had failed to discharge its burden of proof.

[39] Essentially, the retrenchment must be *bona fide* for which we confine ourselves to the four corners of the letter of termination where the grounds are stated. We recognise the management prerogative of reorganisation but subject always to it being exercised *bona fide*.

[40] The evidence was that the appellant's managing director Almond Siah was transferred back to Malaysia to take over the first respondent's function as marketing manager for a few outlets. Prior to 1 March 2018, the first respondent was managing five outlets. After March 2018, the first respondent was managing three outlets which were Village Agro Park, Cameron Highlands and Kampar Free Park. Refer to the first respondent's cross examination in encl. 7/162.

[41] This would mean that the first respondent's function and work as marketing manager was reduced but never eliminated. As was said in *Woo Vain Chan* at pp. 181 to 182 (CLJ); p. 855 (MLJ):

> [17] Another essential feature that needed to be considered in determining whether redundancy existed in an organisation, would be to see *whether 'the work continues to exist or whether the work although continuing to exist lrequires fewer employees to carry it out. The restructuring or reorganisation that is carried out must result in redundancy, that is, it must result in a situation of cessation of work carried out by the employee(s) or a surplus of employees to carry out the particular job function. The issue is whether the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. It is essential that it is the job functions and duties that are affected and not merely the job title or designation. If the same or essentially same work is found to be carried out under a different name or manner, there is no redundancy ...* (see *The Law on Dismissal* by Nallini Pathmanathan, Siva Kumar Kanagasabi and Selvamalar Alagaratnam).
>
> (emphasis added)

[42] We conclude on this point that the termination was without just cause and excuse and the retrenchment was not *bona fide*.

Jurisdiction Of The IC

[43] The thrust of the appellant's submission was that the IC had no jurisdiction to inquire into the reference or make any award of damages or other form of relief when the first respondent had testified that he did not wish to be reinstated. It was also submitted that subsequent to the letter of termination, the first respondent had almost immediately set up a company known as Bee & Joy Enterprise (Bee & Joy).

[44] Reference was made to the evidence of the first respondent as follows in encl. 8/13 and 16:

ONG You know why I'm in Court today?

TSC Yes.

ONG Because the Labour Department will ask me to come today.

TSC So you actually don't want to come to Court? The Labour Department ask you to come to Court, that's why you are here.

ONG Can consider like that.

CHM So, you want to be put back into employment in this Company?

ONG Last time yes, but now no more.

CHM Last time means when?

ONG When the IR ask them come to discussion. But three time also they didn't come to meet up.

[45] To support its contention of no jurisdiction, the appellant referred us to *Holiday Inn* and *Unilever*.

[46] In *Holiday Inn*, the High Court had held at p. 526:

> ... It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s. 20(1) of IRA but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages *in lieu* of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provisions of s. 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction. According to the case of *Dr A Dutt*:
>
> > the right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement.

In the case here the issue in representations for reinstatement no longer arises as the respondent clearly abandoned reinstatement in the course of the hearing before the Industrial Court. According to Chang Min Tat FJ in *Dr A Dutt*'s case at p. 304:

If a workman complains he has been dismissed without just cause or excuse, it does mean that he is dissatisfied with his dismissal or termination of services and he wants his job back. However there may exist circumstances and reasons why reinstatement should not be ordered.

In other words, for compensation for reinstatement to arise:

(i) the workman must "want his job back"; and

(ii) although the workman wants his job back, the Industrial Court would not order reinstatement.

(emphasis added)

[47] At the outset, we note that *Holiday Inn* has been found to be not good law by this court in *Sanbos*.

[48] In *Sanbos*, this court had referred to *Holiday Inn* at paras. 11 to 12 (pp. 934 to 935). At para. 14, reference was also made to *The Borneo Post Sdn Bhd v. Margaret Wong* [2001] 8 CLJ 758 at p. 935 as follows:

[14] ... In that case as well, the employee did not pray for reinstatement in the statement of case filed at the Industrial Court. Denis Ong J held that the omission to pray for reinstatement is a point of procedure and does not affect the jurisdiction of the court. His Lordship said as follows:

> The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits: see s. 29(d) of Act 177. *The Industrial Court derives its jurisdiction from the order of reference by the Minister made under s. 20(3) of Act 177 and which such court must exercise, so it was held in Assunta Hospital v. Dr A Dutt* [1981] 1 MLJ 115; [1980] 1 LNS 121 (FC).
>
> (emphasis added)

[49] At pp. 707 to 708 (CLJ); p. 936 (MLJ) of *Sanbos*, this was next said:

[18] *On our part, we wholly agree with the decision of the learned High Court judge that the Industrial Court was seized with jurisdiction to hear the dispute between the employer and employee in this case once the Minister had duly made a reference under s. 20(3) of the Industrial Relations Act 1967* (Revised 1976). As stated by Denis Ong J in *The Borneo Post Sdn Bhd v. Margaret Wong* and Chang Min Tat FJ in *Assunta Hospital v. Dr A Dutt*, the Industrial Court is invested with jurisdiction because of the Ministerial reference.

(emphasis added)

[50] Finally, at p. 711 (CLJ); p. 940 (MLJ), *Sanbos* held:

> [31] *Therefore, it is not the function of the Industrial Court to question its own jurisdiction simply because the remedy of reinstatement is not pleaded or sought*. In the light of the occasional conflict of views in the Industrial Courts on the issue of jurisdiction if reinstatement is not pleaded or claimed, we state here that the decision in *The Borneo Post Sdn Bhd v. Margaret Wong* on this point is correct. *The Industrial Court does not cease to have jurisdiction once a reference is duly made under s 20(1) of the Industrial Relations Act 1967 (Revised 1976) even if the remedy of reinstatement is not pleaded or pursued at the hearing*.
>
> (emphasis added)

[51] As *Sanbos* stated that on the issue of jurisdiction the decision of *The Borneo Post* is correct, it follows that *Holiday Inn* which took the contrary view, is no longer good law.

[52] We agree with *Sanbos* that the IC is seized with jurisdiction once the Minister had made a reference under s. 20(3) of the Industrial Relations Act 1967 (IRA) and that the IC has such jurisdiction because of the Ministerial reference.

[53] Section 20(1) and (3) of the IRA provides as follows:

> 20(1) Where a workman irrespective of whether he is a member of a trade union or otherwise considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> ...
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[54] Here, even if the first respondent stated that he did not wish to be "put back into employment", the IC nevertheless continued to have jurisdiction as the IC is seized with such jurisdiction pursuant to the Ministerial reference.

[55] It is not disputed that the first respondent along with a few others had set up Bee & Joy which was registered on 14 May 2019. Refer to the company search in encl. 6/146. It was submitted that even if the first respondent wanted reinstatement, this was not possible as he had to manage the operation of Bee & Joy. However, a perusal of the same company search at encl. 6/149 under the heading "information of previous owner" would reveal that the first respondent had withdrawn from Bee & Joy as at 24 Jully 2019. That information showed as follows:

INFORMATION OF PREVIOUS OWNER

NAME	:	ONG HONG YEOK
DATE ON ENTRY	:	14-05-2019
DATE OF WITHDRAWAL	:	24-07-2019
REASON OF WITHDRAWAL	:	PULL-OUT

[56] As for the reliance on *Unilever*, we note that the question of law before the Federal Court was on a narrow scope, namely:

> Whether compensation *in lieu* of reinstatement can be awarded to a person who cannot be reinstated and/or whether the issue of reinstatement even arisesas he had already attained the age of retirement at the time of the filing of his claim (under section 20 of the Industrial Relations Act 1967).

[57] At paras. 19 and 20, the following were said:

> [19] The leave question also speaks of "compensation *in lieu* of reinstatement". The key words "compensation", "*in lieu* of and "reinstatement" are not defined in the IRA 1967. The *Law Lexicon* defines "*in lieu* of" as signifying "instead of" and "in place of". Therefore reading the words "compensation *in lieu* of reinstatement" in plain English it means that such compensation was meant to be a replacement or a substitute or an alternative to reinstatement.
>
> [20] From the phrase "compensation *in lieu* of reinstatement", it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of section 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman "to be reinstated in his former employment". If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be *in lieu* of his reinstatement. After all, reinstatement is a statutorily recognised form of specific performance. On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: "*lex non cogit ad impossiblia*", *ie*, the law does not compel the impossible.

[58] The facts in *Unilever* are such that by the time the award was made, the workman in question had reached his retirement age where reinstatement was not possible. In this appeal, we had earlier found that the function and scope of marketing manager was reduced but the post was never eliminated. Further the first respondent had withdrawn from Bee & Joy on 24 July 2019.

[59] Under the circumstances, it cannot be said that the legal basis for such performance, namely the first respondent to be reinstated, does not exist.

Conclusion

[60] For the above reasons, we find that there is no merit in the appeal and the appeal is dismissed with costs of RM10,000 subject to allocatur.